

## SUMMARY

In the light of the European law, cross-border mergers of companies are mergers of two (or more) entities domiciled in different Member States of the European Union (or contracting parties of the European Economic Area).

The above restructuring process consists in the transfer of all assets and liabilities of the target (acquired company) to the acquirer (acquiring company)(merger by acquisition), or to the newly established company (merger by formation of a new company). The acquired company (or the companies that are merging in order to establish a new company) is wound up without going into liquidation.

The possibility to carry out an international restructuring process arises from the primary European Union law, i.e. Articles 49 and 54 of TFEU (ex Articles 43 and 48 of TEC), whereas the merger procedure is regulated by the secondary European Union law and the national laws of the Member States.

Based on the uniform regulation of Council Regulation (EC) No. 2157/2001 on the Statute for a European company (SE) and the provisions of the Member States' national laws harmonized based on the 10<sup>th</sup> Directive No. 2005/56/EC on cross-border mergers of limited liability companies, it is possible to separate the application of the national laws, which ensures security of the restructuring processes undertaken. At the same time, the two-stage control procedure introduced pursuant to the laws of each Member State which the merging companies are subject to, where this procedure is carried out by the competent registration authorities of the Member States concerned, makes cross-border mergers easier. The final character of the certificates attesting compliance of the conducted procedure with the national law and the prohibition to invalidate a cross-border merger following the registration date, restrict the legal risks associated with the restructuring process.

However, considering that the European legislator has narrowed down the scope of the entities covered by the SE Regulation and the Tenth Directive as compared with the scope of the Treaty provisions, certain entities, such as partnerships, do not fully enjoy the freedom of establishment which they are

entitled to. According to the primary European Union law, all entities that have merging capabilities under the national law can participate in cross-border mergers. Nonetheless, lack of harmonized regulations that would govern the merger procedure involving partnerships results in many complications that are linked with diverse personal statuses enjoyed by merging entities. In addition, it increases transactional risks. What is more, no safeguard mechanisms for third parties – mainly the creditors of the entities involved – are in place. The fact that national regulations on cross-border mergers of partnerships have not been harmonized makes it virtually unfeasible to enact such a merger model – the practice confirms this thesis, because no cross-border merger application involving a partnership has been filed with the Warsaw registry court so far.

On the question of the impact of cross-border mergers on creditors of merging companies, first of all one needs to emphasize that the merger brings about a significant change in the assets and liabilities of the acquirer. Following the universal succession rule, the acquirer enters into all the rights and obligations of the target. However, creditors of merging companies are not equipped with any mechanisms that would allow them to influence the companies' decision as to the merger, and they have no authority to appeal against the resolutions adopted by the companies' bodies either.

Since in general, the creditor has no impact on the decision taken by the companies' bodies as to a cross-border merger, and the merger process in itself may threaten the interests of the creditor, it needs to be concluded that introduction of specific mechanisms aimed to protect the interests of third parties, including creditors, is particularly justified.

Considering that there is no standard EU-wide regime on cross-border mergers, the interests of the creditors of merger participants do not enjoy the same level of protection.

As regards cross-border mergers leading to establishment of a European Company, Article 24 of the Council Regulation (EC) on the Statute for a European company (SE) applies. It provides that the law of the Member State governing each merging company shall apply as in the case of a merger of public limited-liability companies, taking into account the cross-border nature of the merger, with regard to the protection of the interests of creditors of the merging

companies. Consequently, Articles 495, 496 and 511 of the Code of Commercial Companies and Partnerships (hereinafter referred to as: “the CCCP”) apply in Poland. Moreover, in my opinion, creditors of the Polish target company taken over by a foreign acquirer can also enjoy the protection afforded by Article 516<sup>10</sup> of the CCCP, even though the provisions of the Council Regulation do not refer to national regulations on cross-border mergers.

The thesis above is supported by a number of arguments. Firstly, the provisions of the SE Regulation became effective before the enactment of the Tenth Directive on cross-border mergers of companies. For that reason Article 24 of the SE Regulation refers to the application of the national laws on mergers of joint-stock companies rather than directly to the provisions governing cross-border mergers. In addition, it needs to be pointed out that Article 24 of the SE Regulation prescribes that the national law should be applied taking into account the international character of the merger. Therefore, applying only the regulations that govern domestic mergers would be contrary to the foregoing provision, since based on the legislation in force the national law regulates the protection of creditors in the situation of a takeover of a domestic company by a foreign company. Furthermore, depriving the creditors of a Polish company participating in the merger aimed to set up a European company of the rights arising from Article 516<sup>10</sup> of the CCCP would result in different treatment of entities that are in the same legal situation, which is in conflict with the Constitution of the Republic of Poland.

In view of the above it needs to be concluded *de lege lata* that the creditors of the Polish target company may demand that their claims be secured even before the effective date of the cross-border merger resulting in the establishment of *Societas Europaea*. In line with Article 516<sup>10</sup> paragraph 1 of the CCCP, the provisions of Articles 495 and 496 of the CCCP do not apply in this situation.

National laws are also applicable to the cross-border merger of companies which is governed by the regulations issued in the wake of the implementation of the Tenth Directive. This is so because the provision of Article 4 of the Tenth Directive stipulates that a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject

concerning protection of creditors. In Poland, Articles 495, 496, 511 and 516<sup>10</sup> of the CCCP are applicable.

Conversely, protection of creditors in the case of cross-border mergers of partnerships is not regulated at the EU level, and therefore, it seems justified to refer by analogy to the regulations regarding protection of creditors in the case of mergers of domestic partnerships, as laid down by the Member States in which the merging companies are domiciled. In consequence, it should be concluded that the creditors of a partnership with a registered office in Poland which undergoes a merger with a foreign entity are entitled to use the safeguard mechanisms provided for in Article 525 of the CCCP by the reference contained in Article 516<sup>19</sup> of the CCCP.

The conclusion above relies on that fact that the provision of Article 516<sup>19</sup> of the CCCP concerning cross-border mergers of limited joint-stock partnerships refers to applying Article 525 of the CCCP accordingly. In addition, it seems justified to apply the latter provision directly, i.e. without any modification. This standpoint arises from inference by statutory analogy (*analogia legis*) - if it is established that the given situation has not been regulated, but there is a norm concerning an essentially similar situation, the convergent legal consequences of the situation directly governed by the legal regulations should be linked with the non-regulated legal fact. This argument is additionally supported by the need to interpret national laws in a pro-EU manner when construing the legal situations of persons enjoying the freedom of establishment which is guaranteed by the provisions of Articles 49 and 54 of TFEU.

On the other hand, in my view, the creditors of Polish partnerships will not be able to take advantage of the rights guaranteed by the provisions of Articles 495 and 496 of the CCCP or Article 516<sup>10</sup> paragraphs 2 and 3 of the CCCP. Considering the reference to the regulations concerning cross-border mergers of companies made in Article 516<sup>19</sup> of the CCCP, it needs to be concluded that since Articles 495 and 496 of the CCCP are applicable only if the Polish entity acts as the acquirer, the creditors of a Polish partnership cannot enjoy the safeguard mechanisms provided for in the legal regulations mentioned above, because in the light of the Polish law, their debtor entity may be the target company only.

When analysing the availability of the safeguard mechanisms provided by Article 516<sup>10</sup> paragraphs 2 and 3 of the CCCP in respect of cross-border mergers with the participation of Polish partnerships one cannot disregard the functional analysis of that provision. The purpose of the provision at issue is to make it possible for the creditors of a Polish target company acquired by a foreign company to secure their claims arising from termination of the debtor-company as a result of the merger – without liquidation proceedings.

As regards cross-border mergers carried out with the participation of partnerships, the above purpose is fulfilled by Article 525 of the CCCP, which prescribes that the liability of the partners of the merging partnership continues despite the termination of the partnership. In addition, creditors are further protected by their entitlement to bring an action at law against the partner of the partnership, which entitlement is vested in them regardless of whether the enforcement against the assets of the acquirer is effective or not. Creditors may also secure their claims against partners of partnerships even before the end of the proceedings conducted against the partnership.

In view of the argumentation above it needs to be concluded that the interests of the creditors of Polish partnerships participating in a cross-border merger are protected under the partners' liability continuance rule prescribed by Article 525 of the CCCP.

Taking into account the fact that the national laws governing the protection of creditors are not harmonized, in different Member States there are various safeguard mechanisms in place. This situation should be assessed as unfavourable, because it produces many disruptions in the exercise of the entitlements of creditors and the execution of cross-border mergers.

A legal benchmarking study with respect of creditors' protection in European Union Member States based on the example of the regulations implementing the Tenth Directive has made it possible to determine the main institutions of protection of creditors' interests in the European Union, namely:

- the mechanism of universal succession;

- the system of separate management of assets and the associated rule of priority of satisfying the creditor from the assets of the entity being the original debtor;
- the creditor's right to demand security of claims;
- the creditor's *vetor*right in respect of cross-border mergers;
- liability of the partners of the partnership participating in a cross-border merger.

The institution of universal succession is used in all Member States because of the uniform secondary European Union legislation. This is a favourable solution, as it disallows any irregularities at the level of the national laws.

The universal succession constitutes the basic institution of protecting the interests of creditors –it ensures the transfer of the liabilities of the target company (or of the companies that merge in order to establish a new company) to the acquirer (or the newly established company). However, this rule does not sufficiently safeguard the interests of the creditors of entities that participate in the merger. This is so because, as a result of a cross-border merger of companies, the group of entities entitled to raise claims against the acquirer is extended, whereas the assets of the acquirer do not always increase (for instance, if a company in a poor financial condition is acquired). What is more, creditors are forced to pursue their claims abroad, which makes the whole procedure much more difficult for them because of their unfamiliarity with the law that the acquiring company is subject to.

In order to ensure better protection of the interests of the creditors of merging companies, the Member States have introduced into their national laws certain additional safeguard mechanisms that can be employed by the authorised persons.

In the majority of the Member States creditors have the right to demand that their claims be secured (this mechanism has been introduced in the following member states: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, France, Greece, Spain, the Netherlands, Ireland, Lithuania, Luxembourg, Malta, Germany, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, Hungary, the United Kingdom and in Italy).

The studies conducted show that creditors are equipped with the aforesaid safeguard mechanism in the countries where an analogous protection mechanism is granted in the case of mergers of domestic companies. However, an additional safeguard exists, namely the aforesaid right is valid even before the cross-border merger of companies takes effect, whereas in domestic mergers, the protection mechanism has an *ex post* character only.

Nonetheless, there are certain discrepancies between the solutions used (e.g. with regard to how long the safeguard mechanism applies, the date at which the protection of creditors begins or the authority that supervises the compliance of the restructuring process with the national regulations of the law), which do not impact favourably the cross-border merger process or the situation of the creditors – because of these variations creditors do not have a clear picture of the rights they are furnished with, and this may compound their negative attitude towards the planned restructuring process.

In addition, providing creditors with *ex ante* protection in cross-border mergers of companies, where in respect of mergers of domestic companies the creditors may enjoy the protection right only after the merger is completed, leads to different and discriminating treatment of cross-border mergers, which goes against the provisions of the Treaty governing the freedom of establishment.

I believe that the institution of securing the claims raised by creditors is the most effective safeguard measure. This mechanism ensures adequate security of the interests of the creditors of merging companies without impeding the merger process itself, and makes it possible to balance and properly safeguard the interests of the creditors and the companies alike. However, the institution of securing the creditors' claims should be regulated at the European Union level so as to ensure that the entitled persons enjoy the same protection in the case of both domestic and cross-border mergers.

Another safeguard mechanism provided to creditors in many European Union Member States is the right to raise an objection against a cross-border merger of companies, if the merger threatens the interests of the creditors (the *veto right*). This solution can be found in the legal systems of the following countries: Finland, France, Greece, Spain, the Netherlands, Ireland, Malta, Portugal, Romania, Sweden, the United Kingdom and Italy. The possibility that creditors

will exercise their *veto* right and block the merger can potentially be the most important obstacle to cross-border mergers.

There are a number of arguments against the above-mentioned safeguard mechanism. First of all, the obligation relation between the creditor and the debtor company disallows putting any of the parties in a privileged position, and if the power of veto - which effectively blocks the merger - is used, the protection of the interests of both parties is not balanced.

Furthermore, in line with the jurisprudence of EU Court of Justice, the measures used to protect creditors can neither go beyond the purpose which they have been designed for nor hinder cross-border mergers. The creditor's *veto* right, which effectively prevents the merger, extends beyond the purpose of protecting the interests of the creditors, especially in view of the fact that there are other safeguard measures that can properly secure the creditors' interests without preventing cross-border restructuring –it specifically holds true for the institution of securing the claims of the creditor.

This dissertation presents the issues connected with the protection of creditors in cross-border mergers and its impact on the entities' enjoying the freedom of establishment guaranteed under the EU Treaty.

The freedom of establishment is not absolute in its character. In line with Articles 51 and 52 of TFEU and taking into account the prerequisites included in these provisions, the Member States may incorporate into their national legislation certain limitations on the exercise of that freedom. Based on the studies conducted it can be concluded that applying certain measures to restrict the freedom of establishment is acceptable, if the following conditions are met: the introduced restrictions are not applied in a discriminating manner (ban on discrimination on the grounds of nationality), they are justified by the general interest, they are fit for the accomplishment of the goal that they have been designed for (adequacy requirement), and they do not go beyond what is necessary in order to attain that goal (the principle of proportionality).

According to the analysis carried out, problems start to occur when the national legislation goes beyond the restrictions allowed under the EU Treaty and the case-law of the European Court of Justice.



The legal benchmarking confirms that the Member States have various practices in place to protect creditors in the course of cross-border mergers, even though there seem to be no grounds to justify such diversity. Despite the fact that arguments can be found in favour of a free choice as regards the system of protecting creditors, if such liberty negatively affects the existence of the EU common market and the exercise of the freedoms guaranteed by the Treaty, one needs to consider to what extent these arguments should actually be taken into account. Ensuring effective and proportionate protection of creditors must constitute the basis of the corporate law, because it guarantees a high level of confidence in business relations, and - what is most important - it does not permit unacceptable restriction of the freedom of establishment.

An adequate form of protecting creditors is when cross-border mergers are encouraged and the creditors' interests are sufficiently protected.

Creditors are more familiar with their domestic legal system as compared with any foreign ones. The fact that they will be forced to deal with a legal system that they do not know is a consequence of the cross-border merger - it should be counted among the 'psychological obstacles' for the creditors' acceptance of the merger process. If the rights of creditors are not harmonised, it may become an obstacle hindering the companies' participation in cross-border restructuring processes.

The optimum solution would be to fully harmonise the regulations that govern the protection of the creditors of companies participating in mergers, but arriving at the desired outcome may be difficult to execute in practice, because the EU Member States follow their own economic principles.

A more flexible remedy would be to partially harmonise the regulations so as to do away with discrimination - as a result, creditors would be subject to the same kinds of safeguards in domestic and in cross-border mergers. This solution is all the more desirable, considering that the *de lege lata* discrimination of the cross-border merger process, as compared with the domestic combination of companies, is an unacceptable limitation on the freedom of establishment guaranteed by the Treaty.

The analysis conducted proves that more harmonised protection of creditors across the entire territory of the European Union not only would be beneficial to creditors but also would render the merger process more effective, which in turn would allow companies to use more effectively the freedoms granted to them under the primary European Union law.

The study made in the scope of the legal regulations concerning the protection of the creditors of the companies that participate in cross-border mergers has led to the following *de legeferenda* postulates:

1. The legal regulations governing the protection of creditors' interests should be harmonised.

In my opinion, a fair solution would be to fully harmonize the legislation concerning the protection of creditors in cross-border mergers of companies, by allowing creditors the right to demand securing of their claims before finalization of the merger and in respect of each type of the merger (regardless of its nature), with simultaneous elimination of the *veto* right which effectively hinders the merger process. Then, the regulations would be in line with the provisions of the Treaty regarding the freedom of establishment which disallow applying any measures to limit the freedom of establishment where such measures go beyond the objective pursued, and which disallow discrimination of the merger on account of its cross-border nature. In addition, introducing an *ex antes* safeguard would not worsen the situation of creditors in a merger. Applying a reverse mechanism, i.e. granting *ex post* protection in both domestic and cross-border mergers, could be unfair to the creditors of companies participating in cross-border mergers where the level of risks involved is higher.

The same degree of safeguarding the creditors' interests in the case of both domestic and cross-border company combinations occurs in the U.S. legislation. Creditors are not provided with any additional protection measures on account of the cross-border character of the merger – in the case of a cross-border merger the regulations binding for domestic mergers apply.

Full harmonisation of the regulations governing the protection of creditors would ensure transparency of those regulations, which in turn would streamline the merger procedure and reduce the level of uncertainty linked with finalising a

cross-border merger in the face of various safeguards, especially the *veto* right introduced into the legal systems of many Member States, differing periods of protection or various dates as from which the protection of creditors begins.

Doing away with the *veto* right which may effectively hinder the merger process would help introduce balance between the protection of the creditors' interests and the protection of the interests of the companies involved.

Furthermore, it needs to be pointed out that both the regulations that govern domestic combinations of entities and the regulations on cross-border mergers need to be harmonised. Conversely, harmonising only the law on cross-border mergers would cause that in the EU Member States that give the *veto* right to creditors in mergers of domestic companies, the creditors in cross-border mergers would only dispose of the safeguard of securing their claims. Hence, a situation would exist that creditors involved in domestic mergers would be equipped with a 'stronger' protection mechanism than creditors in cross-border mergers.

Harmonising the regulations that govern the protection of creditors in mergers of companies would also make it easier for the competent authorities to control whether the entities concerned fulfil their disclosure obligations.

Considering the legislation which is currently in force and the various mechanisms of protection of the creditors' interests, cross-border merger terms often lack clear and reliable information about the entitlements of creditors. In fact, merger terms only include laconic data, which renders it impossible to control whether creditors receive full and legally consistent information about the protection measures that they are entitled to.

2. Cross-border mergers of partnerships should be regulated at the EU level, because it will enable partnerships to enjoy the freedom of establishment guaranteed for them in the Treaty, and in addition, it will help define the mechanisms of the creditors' protection in a clear and unambiguous manner.
3. The provisions of the SE Regulation should be aligned with the legislation currently in force so as to avoid the difficulties that are currently encountered when applying it.

The SE Regulation became effective before the enactment of the Tenth Directive and that is why the references included therein concern mergers of domestic joint-stock companies. At present the national laws of the EU Member States contain regulations on cross-border mergers of companies which should also be applied to cross-border mergers resulting in the establishment of European companies.